No. 16-3076

No. 16-3570

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION, Petitioner – Cross-Respondent,

JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent – Cross-Petitioner,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

FINAL FORM REPLY BRIEF FOR PETITIONER/ CROSS-RESPONDENT NOVELIS CORPORATION

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I. INTRODUCTION

Novelis will not set forth every disagreement or flaw with the Board's and Union's briefs.[1] Instead, Novelis will address three areas pertaining to the Board's unjustified attempt to impose the most extreme and disfavored remedy in labor law, a *Gissel* bargaining order.

First, although the Board and Union seek to avoid scrutiny of the bargaining order, the Second Circuit requires far more than the cursory review they suggest. The Board's refusal to follow this Court's longstanding requirements for issuing a bargaining order means the Board's Decision is entitled to no deference. Indeed, even if Novelis engaged in every alleged ULP, the Board's (non-)analysis is not permitted by this Court, and its bargaining order cannot stand.

Second, Novelis was wrongly prevented from offering evidence to prove Crew Leader Abare solicited authorization cards as a statutory supervisor. It is undisputed that an employer's challenge to card validity is timely raised during cross-examination of a card solicitor, or by calling card signers during its own case. Nevertheless, Novelis was prohibited from litigating Abare's supervisory status, which would have determined whether the Union could have had majority support (a prerequisite for a bargaining order). At a minimum, this Court should remand this issue.

[1] Novelis' Principal Brief is cited as "Pet.-Br.," the Board's Brief as "Bd.-Br.," and the Union's Brief as "U.-Br."

Finally, the finding that Novelis unlawfully conferred benefits cannot be enforced because the GC failed to prove an essential element - employer knowledge of organizing. Neither the Board's nor Union's briefs successfully address the total absence of competent evidence supporting this alleged "hallmark" violation supporting the bargaining order.[2]

II. THE BOARD FAILS TO JUSTIFY THE EXTRAORDINARY REMEDY OF A BARGAINING ORDER

Of the many deficiencies warranting non-enforcement of the Board's Decision, the Board's defiance of controlling Second Circuit law regarding bargaining orders is the most blatant. The law of this Circuit is clear. This Court will not uphold a bargaining order where the Board: (i) refuses to consider evidence of changed circumstances; (ii) infers, without factual support, "lingering effects" of ULPs, ULPs were "widely disseminated" to the workforce, or ULPs

[2] The Board's brief carried forward the ALJ's mischaracterization of the record. For instance, the Board asserts that an "S-21 Schedule" is one of two employee schedules, when no evidence exists that Novelis uses such schedule. Bd.-Br. 4. The Board relies upon the testimony of one employee who testified that he has not worked an S-21 since 1993, and that he is unaware of an S-21 being used since. A-192[Tr.-844-45]. The Board also asserts that card solicitors obtained 351 signed authorization cards between December 17 and January 5 (*see* Bd-Br. 7), when many cards were signed well after that date. A-658, A-746, A-748, A-814, A-816, A-832-824, A-828, A-834-835, A-837, A-842, A-844-846, A-856-858, A-913, A-915-918. Additionally, the Board misleadingly refers to certain documents on the plant floor as "anti-union documents" (Bd.-Br. 9-10) when such documents were actually informational company handouts that have not been challenged as unlawful. The Board's willingness to play fast and loose with these and other facts further calls into question its decision.

would continue to impact the possibility of a fair election; or (iii) refuses to consider employer remedial measures.

If there were ever a case in which the Board chose to ignore controlling law, it is this one. The Board's brief reads like an instructional guide on how *not* to follow this Court's precedent. Consider the approach by this Court in bargaining order cases versus the Board's approach here:

- **On the relevance of changed circumstances:**
  - **This Court**: "By now, it should be perfectly clear to the Board that it must show that the bargaining order is appropriate when it is issued, not at some earlier date." *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 101 (2d Cir. 1985); *see also HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1332-33 (2d Cir. 1996) (chastising Board for "ignor[ing] our consistent holdings that events subsequent to the employer's violations such as the passage of time and substantial turnover of employees are relevant and important").
  - **The Board**: "Under Board law, the Board evaluates the appropriateness of a *Gissel* bargaining order as of the time the unfair labor practices occurred and does not generally consider any changes in circumstances thereafter." Bd.-Br. 80.
- **On the need for evidence establishing dissemination of ULPs:**

- **This Court**: "We will not presume . . . dissemination [of ULPs] when the issue concerns the possibility of holding a fair election." *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228, 231 (2d Cir. 1983).
- **The Board**: "Proof of dissemination is not required." Bd.-Br. 75.

- **On the propriety of assuming lingering effects without record support:**
  - **This Court**: The Board "merely assumed that the unfair labor practices would be the topic of discussion and repetition among both old and new employees" and "engaged in the type of superficial and conclusory analysis criticized [by the Court]." *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 112 (2d Cir. 1984). "Simply adding a conclusory statement that . . . violations are likely to have a 'lasting inhibitive effect' does not satisfy the board's obligation to analyze whether such an effect is actually present here and how it will prevent a fair election." *J. Coty*, 100.
  - **The Board**: "[T]hreats are likely to live on in the lore of the shop, passed on from old employees to new arrivals, and exert a continuing coercive influence." Bd.-Br. 81.[3]

[3] This Circuit has not accepted the "lore of the shop" theory, which presupposes the Board is an expert in sociology, psychology, and employee memory function. Here, the theory lacks any evidentiary support and is actually refuted by the "deluge" of testimony showing that employees did not hear or remember any threats. A-1717 n.79. The Board's reliance on this overused adage is directly contrary to this Court's prohibition of reliance on unsupported assumptions and speculation when analyzing impact, lingering effects, or

- **On the relevance of employee testimony regarding the impact of ULPs:**
  - **This Court**: "[T]he impressive amount of testimony by employees who did not even recall the statements which were found to constitute unfair labor practices suggests that the effects of those practices would be minimal." *NLRB v. Chester Valley, Inc*., 652 F.2d 263, 273 (2d Cir. 1981).
  - **The Board**, upholding the ALJ's refusal to allow employees to testify they heard no threats: "The Board has long held that because threats of . . . job loss are among the most flagrant of [ULPs], they are likely to persist in the employees' minds for longer periods of time than other unlawful conduct." A-1699.
- **On the need for evidence supporting pervasiveness:**
  - **This Court**: "A bargaining order may be denied for lack of proof of pervasiveness, such as where the discharge of an employee was unknown to most of the other employees." *NLRB v. Jamaica Towing, Inc*., 632 F.2d 208, 212-13 (2d Cir. 1980).

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dissemination to other employees. *See J. Coty*, 100; *Pace*, 111-12; *Marion*, 231; *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153 (2d Cir. 1981) (violations could not support issuance of bargaining order where "there is no evidence that the violations were ever communicated to other employees"); *see also Be-Lo Stores v. NLRB*, 126 F.3d 268, 283 (4th Cir. 1997) ("[I]nferences as to the likely effect of 'lore of the shop' have no place in the calculus of whether a mandatory bargaining order is warranted. Under such a speculative and indeterminate standard, the Board could decide in every case that the 'possibility of a fair rerun election is slight,' even if the entire work force had turned over[.]").

- **The Board**, failing to acknowledge that only a handful of employees (out of 600) testified to knowing of Abare's demotion: "[T]he Board reasonably found that Abare's demotion was 'likely to have a lasting effect on a large percentage of [Novelis'] work force and to remain in employees' memories for a long period.'" Bd.-Br. 78.

- **On the appropriateness of inferring employer misconduct affected election conditions:**
  - **This Court**: "As to inhibitory effects [of ULPs], the Board focused only on the violations and their severity. It went on to infer from these findings that the effect of the violations was indelible . . . The Board should have considered testimony of the employees themselves as indicative of their degree of intimidation." *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928, 934 (2d Cir. 1980).
  - **The Board**: "[B]ecause the Board applies an objective, not subjective, test, there is no basis to Novelis' claim that the Board failed to consider evidence that Novelis' unfair labor practices did not affect the election results." Bd.-Br. 87.

- **On the likelihood of implied threats having a lasting, inhibitory effect:**

- **This Court**: "The unfair practices almost all consisted of implied rather than overt threats or promises, and thus were less likely to have a strong and lasting effect." *Grandee Beer,* 934.
- **The Board**: "Martens' implicit threat of job loss," coupled with Smith's non-hallmark threat of lost business, "are particularly likely to destroy the chances of a fair re-run election." A-1699. In its brief, after failing to acknowledge its own finding that Martens' threat was implied: "Such job loss threats are powerfully coercive, and militate in favor of a bargaining order." Bd.-Br. 74.

This Court should follow its precedent and reject the Board's bargaining order.

A. The Board And Union Misstate The Standard Of Review

The Board and Union contend *Gissel* orders may be reviewed *only* for an abuse of discretion. They are wrong. First, the Board must follow the legal standards established by this Court. As summarized above, the Board did not.

Second, the factual findings justifying a bargaining order must be supported by substantial evidence. Where, as here, the Board refuses to follow this Court's holdings and makes factual findings that are unsupported or contradicted by the evidence, the Board's remedy should receive no deference. Indeed, in *Grandee Beer*, 933, this Court held that "[i]n determining the validity of the bargaining order, this court is required to test the Board's action *by the substantial evidence*

standard" (emphasis added). Later decisions have applied a similar standard of review to Board remedies. *See, e.g., Emhart Industries v. NLRB*, 907 F.2d 372, 379 (2d Cir. 1990).

Although this Court suggested *Gissel* orders are reviewed for abuse of discretion in *Kinney Drugs, Inc. v. NLRB,* 74 F.3d 1419 (2d Cir. 1996), this statement does not contradict or overrule the Court's holding in *Grandee Beer* and other Second Circuit cases requiring "close review" of bargaining orders. *See, e.g., NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 866 (2d Cir. 1984) ("[W]e have consistently and closely reviewed NLRB justifications for bargaining orders[.]") (analysis must "at the very least, be meaningful"); *NLRB v. Heads and Threads Co.*, 724 F.2d 282, 289 (2d Cir. 1983) (requiring "a particularly thorough analysis of the need for a bargaining order."). And, indeed, in *Kinney*, 1428-32, this Court conducted a close review of the Board's bargaining order and refused to enforce it.

Had the Board based its findings on actual evidence, admitted the improperly excluded evidence and analyzed factors such as changed circumstances, employee turnover, passage of time, and employer remedial measures, then perhaps its choice of remedy would be entitled to some deference. But when the Board refuses to follow the basic requirements for a *Gissel* order long-established by this Court, it *has* abused its discretion and should receive no deference.

As a practical matter, this Court uses a far more exacting standard than a generalized abuse of discretion standard (including in *Kinney* itself) when

analyzing Board bargaining orders. The Court has never strayed from the premise that bargaining orders are rare remedies warranted only upon a specific showing of necessity established through record evidence, thorough analysis, and due consideration of changed circumstances. Board decisions lacking these critical elements cannot be enforced, regardless of the standard of review.

B. The Board's Refusal To Consider Changed Circumstances Prevents Enforcement Of The Bargaining Order

This Court has chastised the Board for "flout[ing] the mandates of this Circuit" and "ignor[ing] our consistent holdings that 'events subsequent to the employer's violations such as the passage of time and the substantial turnover of employees, are relevant and important factors which should be considered'" before a bargaining order may issue. *HarperCollins*, 1332-33 (quoting *Marion*, 231).[4]

Refusing to accept these repeated admonitions, the Board states in its Decision that "the Board *does not* consider turnover among bargaining unit employees or management officials and the passage of time in determining whether a *Gissel* order is appropriate." A-1700 n.17 (emphasis added). The Board's brief attempts to soften this statement, suggesting it "does not *generally* consider any changes in circumstances" occurring after commission of unlawful practices. Bd.-Br. 80 (emphasis added). But the Board's lawyers cannot mask the

[4] The Union concedes the Board is required to consider management and employee turnover and passage of time. U.-Br. 12, 32.

Board's refusal to consider changed circumstances here. This obstinate refusal to follow this Circuit's mandates bars enforcement.[5]

Amazingly, the Board contends its Decision complies with Circuit precedent. In doing so, the Board relies solely on a footnote stating "even if we were to consider [Novelis'] evidence, it would not require a different result." A-1700 n.17. But, the Board did *not* consider or provide any analysis of Novelis' evidence. Nor could it have, as it refused Novelis' multiple requests to present it. The Board then argues this Court should defer to its "analysis" of the excluded evidence described in footnote 17.

The Board's approach in this case is almost identical to its handling of changed circumstances in *J. Coty*. There, the Board upheld the ALJ's bargaining order without analyzing changed circumstances. In a footnote, Member Hunter remarked he "does not necessarily concur" with the Second Circuit's view on the

[5] An exasperated D.C. Circuit recently noted that the Board's obduracy is used as an "instrument of oppression" sending the message of: "Even if we think you will win, we will still make you pay[,]" and daring a party to "employ the money and power needed to pay for and survive the process of fighting with an agency through its administrative processes and into the federal courts of appeals." *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 18, 28 (D.C. Cir. 2016) (awarding attorneys' fees to employer for Board's unreasonable and bad-faith nonacquiescence to Circuit Court law). The Board has refused to comply with the mandates of this Court, and virtually every other Circuit, for nearly half a century on this point. *See NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 449 (5th Cir. 1970) (denying enforcement of bargaining order due to Board's repeated failure to consider necessity at time issued); *J.L.M., Inc. v. NLRB,* 31 F.3d 79, 84 (2d Cir. 1994) (collecting cases); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996); *NLRB v. Cell Agr. Mfg. Co.*, 41 F.3d 389, 397-98 (8th Cir. 1994) (collecting cases).

subject, but the serious and pervasive nature of the employer's misconduct warranted a bargaining order notwithstanding employee turnover. *J. Coty Messenger Svc., Inc.,* 272 NLRB 268, 269 n.11 (1984).

This Court was unimpressed with the Board's "stab at analysis":

> The only grudging recognition that employee turnover might be considered a factor in a proper analysis comes in a footnote -- apparently reflecting the views of only one member of the panel -- that begins by noting that the member does not necessarily agree with the [S]econd [C]ircuit's position that employee turnover is a relevant consideration. Even assuming its relevance, he continues, a bargaining order should still issue here since these were "hallmark" violations with a lasting inhibitive effect, and since the nineteen employees had left before the unfair labor practices ended.

J. Coty, 100. The Court rejected the bargaining order, "fault[ing] the Board for failing to undertake the proper analysis and instead indulging in its 'well-established preference for issuing a bargaining order.'" *Id*.

The Board did the same thing here, but took it one step further. Unlike in *J. Coty*, the Board did not even allow Novelis to present its changed circumstances evidence. It then purported to "consider" Novelis' rejected evidence, and claimed, *without analysis,* that the evidence would not have changed the outcome.

The Board's other attempts to justify its refusal to consider changed circumstances are equally unavailing. For example, the Board attempts to discount the departures of CEO Martens and Plant Manager Smith - the senior executives accused of the most serious implied threats (putting aside that these "threats" were unfairly stitched together implications generated by the GC, ALJ and Board and

are contradicted by the record). The Board argues these departures are inconsequential because other, lower-level managers remain with Novelis. Bd.-Br. 80. But, none of these managers were accused of serious violations, and their alleged incidents involved a small number of employees. The Board makes no attempt to explain how they possibly serve as a "continued reminder" to employees of threats made by higher-level managers *who are now gone*.

The Board then argues that Novelis' changed circumstances evidence would not change the outcome because, among other things, its "ownership remains the same." Bd.-Br. 80. Aside from being stunningly irrelevant, this comment is not based on any evidence.

In its continuing use of rote phrases to justify its results, the Board argues that Novelis' evidence of employee turnover is not relevant because those who remain employed "are likely to have informed any new employees of what transpired during the Union's organizing campaign." Bd.-Br. 81. This is pure speculation. No evidence exists that employees talked to each other about the alleged threats. In fact, the only evidence is that numerous employees did not hear or recall any such threats. In the Board's eyes, actual evidence of employee turnover may be rejected but it is entitled to rely on pure speculation that new employees must have been told about Novelis' alleged past misconduct. That is not the reasoned analysis required by this Court.

This Court has recognized since *J. Coty* that the Board cannot have it both ways. It cannot simultaneously reaffirm its longstanding refusal to consider

evidence of changed circumstances, and then contend that the refusal is excusable because the evidence would not have made a difference, particularly when its reasons for rejecting the evidence are baseless. That is exactly what the Board is attempting to do here. This non-analysis does not remotely satisfy the Board's obligation to meaningfully consider evidence of changed circumstances, and the Court should not allow it. *J.L.M.,* 85 (analysis of employee turnover cursory at best and insufficient to justify bargaining order); *Cogburn Health Ctr., Inc. v. NLRB*, 437 F.3d 1266, 1274 (D.C. Cir. 2006) ("rote treatment" and "cursory review" of changed circumstances evidence insufficient; ignoring evidence of employee turnover "alone dooms the Board's order").

Despite the clear mandate to consider employee turnover, passage of time, and absence of subsequent ULPs, the Board denied Novelis' motions to reopen the record and refused to consider any such evidence.[6] This alone is fatal to the bargaining order.

C. The Board's Suppositions Regarding The Need For A Bargaining Order Ignore, Or Are Contrary To, Record Evidence

The Board's bargaining order analysis, if it can be called that, makes no effort at actual fact-finding. It is based entirely on its use of rote and repetitive suppositions aimed to justify bargaining orders based on its subjective views of the allegations. For example, each of the following "findings" lacks evidence:

[6] As of the filing of this brief, Novelis has hired 323 employees into the bargaining unit. 99 employees are no longer employed in the bargaining unit. Not only would overturning the election disenfranchise those who voted in 2014, it would disenfranchise over 320 new employees.

- Martens' and Smith's threats "are powerfully coercive, and militate in favor of a bargaining order." Bd.-Br. 74.
- Their threats "would likely be viewed as highly credible expressions of Novelis' intentions." *Id*.
- Proof of dissemination of their threats "is not required, because any expressions of company attitudes even to small groups of individuals, were likely to be rapidly disseminated around a plant during the struggle of organization." Bd.-Br. 75.[7]
- The Board reasonably found that Abare's demotion "was likely to have a lasting effect on a large percentage of [Novelis'] work force and to remain in employees' memories for a long period." Bd.-Br. 78.
- The Board found "that the seriousness of the employer's behavior has not been dissipated," and so any change in the composition of the bargaining unit did not obviate the need for a bargaining order. Bd.-Br. 83.

In each instance, the Board overlooked that either no evidence exists to support its findings, or the evidence contradicted its findings. The Board's nonchalant approach to fact-finding warrants no deference from this Court.

[7] The Board cites *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 179 (2d Cir. 1965) for this proposition. However, the Board quotes from the Court's analysis of whether the underlying ULP occurred, not whether a bargaining order was proper. These are obviously two different inquiries.

This Court's precedent requires that the Board identify *actual evidence*—particularly in a Category II *Gissel* case like this one, where the ULPs alleged are not inherently pervasive - to support its conclusions regarding the impact of Novelis' violations, whether their effects continue to linger, and whether Novelis is likely to commit future violations. The Board makes no effort to do so.

Novelis attempted to introduce a mountain of evidence (Pet.-Br. 74-84) that would have established that factors besides the ULPs impacted union support and that employees do not recall hearing any threats, did not attend the speeches, and did not know what was said by Martens or Smith. This evidence would have undermined the necessity of a bargaining order.

The Board argues the ALJ properly excluded this evidence because "the Board considers objective, rather than subjective, evidence of the effects of [ULPs]," and that *Gissel* holds that "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union." Bd.-Br. 86-87 (citing *Gissel*, 608). This portion of *Gissel*, however, concerns the proper evidentiary standard for determining the validity of signed cards, *not* the propriety of bargaining orders. This Court has made clear that employee recollections (or lack thereof) of an employer's misconduct is highly relevant to the inquiry of lingering effects. *Chester Valley*, 273. The Board does not even attempt to distinguish or reconcile *Chester Valley*.

D. The Union Relies On Outdated And Inapt Cases To Justify The Bargaining Order

The cases the Union relies upon are incorrectly portrayed or distinguishable. Due to space constraints, Novelis only highlights some of the significant differences.

For example, *NLRB v. International Metal*, 443 F.2d 870, was decided in 1970, before the Court began instructing the Board to consider subsequent mitigating factors in bargaining order analyses. Indeed, the Union admits that *International Metal* does not contain "a detailed explanation as to why this Court deemed the employers' violations sufficient to sustain a *Gissel* II bargaining order" and that "[b]eginning with *General Stencils*, this Court's application of *Gissel* has evolved since *International Metal Specialties* issued, particularly as to the relevance of events subsequent to the election." U.-Br. 14, 15. Thus, by its own admission, the Union is relying on an outdated case.[8] Moreover, *International Metal* involved a bargaining unit of only 29 employees and the issue of changed circumstances was not at issue in the Court's very brief analysis of the bargaining order. *Id.*, 872-73.

Likewise, *NLRB v. Scoler's Inc.*, 466 F.2d 1289 (2d Cir. 1972), is inapposite. The bargaining unit in *Scoler's* was only 19 employees, i.e., a "small closely-knit unit," and the ULPs were found to be sufficiently widespread. *Id.,*

[8] The Union asserts that *International Metal* "contains the Circuit's contemporaneous interpretation of the requirements of *Gissel.*" U.-Br. 15. Even if true, this does not override the Second Circuit's subsequent bargaining order jurisprudence.

1293. The distinction from the present case is clear: the pervasive impact of the ULPs on the small unit in *Scoler's* cannot be equated to a bargaining unit of 600 (now over 800) employees working in a massive facility with multiple shift schedules, especially when there is no evidence of dissemination or lingering effects. This case also was decided before the development of Second Circuit jurisprudence requiring consideration of changed circumstances.

Lastly, the Union's reliance on *NLRB v. W.A.D. Rentals Ltd*., 919 F.2d 839, for the contention that consideration of employee turnover would offend labor policy because it incentivizes delay tactics and encourages the commission of ULPs, is meritless. U.-Br. 35. First, this assertion is contradicted by scores of Second Circuit and other Circuit Court cases. Secondly, the factual basis of *W.A.D.* was entirely different in that the union originally won the election, and the employer later unlawfully withdrew recognition, unlawfully refused to bargain, and engaged in overt delay tactics. *Id*., 840-41. The Court specifically pointed to the employer's delay tactics in refusing to consider the turnover rate. *Id*.

Conversely, here the Union did not win the election, nor was there unlawful withdrawal of recognition. Additionally, there is no evidence or allegation that Novelis engaged in delay tactics. Indeed, it was the Board that took more than sixteen months to issue a decision after receiving exceptions to the ALJ's decision.

In contrast to the Union's assertions, this Court has denied enforcement of bargaining orders in cases involving much more egregious alleged conduct where the Board has failed to conduct the required analysis. *See, e.g., J.L.M.,* 81-83

(employer threatened union supporters, encouraged anti-union sentiment, used police presence to suggest imminent danger from Union, reduced union supporters' hours, discharged employee for union activities, posted notices about the employee's discharge as threat to others, and continued ULPs after election) (enforcement denied due to failure to consider turnover and passage of time and to explain insufficiency of traditional remedies); *J. Coty,* 95-96; *Windsor,* 860; *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984) (employer interrogated employees, surveilled employees, disparately enforced rules, granted benefits, blamed union during critical period before election, targeted union adherents, discharged employee, disciplined employees for union activities, and granted wage increases without bargaining after ALJ decision) (enforcement denied due to failure to consider passage of time and turnover); *Heads and Threads,* 282 (employer discharged employee, threatened discharge, imposed more onerous working conditions, made physical threats, promised benefits/promotion, and failed to reinstate strikers) (enforcement denied due to failure to consider changed circumstances); *Marion,* 228; *Pace,* 99.

III. THE BOARD IMPROPERLY REJECTED NOVELIS' *HARBORSIDE* EVIDENCE

Enforcement of the bargaining order must be denied on the additional ground that majority status (a prerequisite for a bargaining order) was based on the erroneous exclusion of material evidence. The Board does not dispute that a bargaining order cannot issue if the Union lacks majority support and that under *Harborside*, cards solicited by supervisors do not count towards majority support.

Further, the Board has held that an employer's challenge to the validity of cards is timely raised during cross-examination of a card solicitor, or by calling card signers during its own case. *Montgomery Ward & Co., Inc*., 253 NLRB 196 (1980). Yet, the ALJ and Board completely shut down Novelis' attempt to raise this legitimate issue, which, at a minimum, warrants a remand.

A. Evidence Of Abare's Supervisory Status Was Introduced The First Day Of Witness Testimony

The Board's brief misleadingly suggests Novelis did not attempt to develop evidence of Abare's supervisory status until fifteen days into the hearing. The GC broached the subject of Abare's supervisory duties during his examination the second day of the hearing (the first day of witness testimony). A-93–96[Tr.-246-56]. Novelis, at its first opportunity to cross-examine Abare, questioned him about his responsibilities as a Crew Leader and elicited testimony that demonstrated his supervisory duties. A-131–136[Tr.-492-512]. Novelis also questioned Abare about the circumstances surrounding his card solicitations. A-142–148[Tr.-542-563]. Novelis then sought to introduce additional evidence in its own case-in-chief establishing Abare's supervisory tasks. Pet.-Br. 54-55. The claim that Novelis did not raise this issue until fifteen days into the hearing is simply untrue.

B. Novelis Was Not Required To Assert A *Harborside* Challenge In Its Answer

The Board erroneously asserts that Novelis' purported failure to plead supervisory status as a defense in its answer means that Novelis could not litigate Abare's supervisory status. Bd.-Br. 69. Setting aside the fact that Novelis *did*

adequately raise this issue in its answer,[9] whether it was raised as an affirmative defense to the unlawful demotion charge has nothing to do with whether the evidence was relevant to the validity of the cards Abare solicited. The Board's brief glosses over this distinction because it cannot dispute that Novelis was under no obligation to affirmatively plead Abare's supervisory status *as a ground for challenging majority status*. Indeed, there is no way for an employer to know who solicited cards until the GC presents such testimony.

If, as the Board concedes, the validity of cards may be raised during cross-examination or in a party's case-in-chief, which is precisely what Novelis did, it was error to exclude such evidence. The underlying reason for challenging the cards (*i.e.,* Abare's supervisory status) is irrelevant to *when* the cards may be challenged. Board law permits card challenges to be raised via cross-examination or in the case-in-chief. Denying Novelis the right to do so was plain error and an abuse of discretion.

C. Novelis Was Not Obligated To Raise A *Harborside* Challenge Earlier

Likewise, the assertion that Novelis did not raise the issue "at critical junctures of this litigation" is unavailing. Bd.-Br. 70. The Board cites no authority requiring Novelis to raise the issue at any such "junctures." Nor does it offer authority for denying an employer its right to challenge authorization cards during a ULP hearing. This is because, as stated *supra*, a challenge to cards can be timely

[9] Novelis properly pleaded this defense, but even if it had not, the appropriate remedy was to permit Novelis to amend its answer. Pet.-Br. 40-41.

raised during cross-examination of a card solicitor or in an employer's own case. *Montgomery Ward,* 196.

The argument that Novelis did not object, on the basis of supervisory status, to the admission of the cards Abare solicited is a red herring. "[F]ailure to object to the admission of a card into evidence waives only the right to question its authenticity at a later time." *Id.* The *admissibility* of the cards did not depend on Abare's supervisory status. Rather, the GC's ability to rely on those cards as evidence of majority status depended on his supervisory status.[10]

D. The Pre-Election Stipulations Do Not Bar Litigation Of Abare's Supervisory Status

The Board argues that under *Kinney*, this Court views pre-election stipulations as a "contract" and as evidence of eligible voters. Bd.-Br. 72. The Board overstates the Court's holding, as the Court actually held that "Kinney's pre-election list of eligible voters and the union's acceptance of that list constitute *evidence* as to who the temporary employees *might be*." *Kinney,* 1434 (emphasis added). *Kinney* does not require exclusion of evidence to the contrary or suggest that pre-election stipulations are dispositive of supervisory status or otherwise bar subsequent litigation of the issue. *Id.* Notably, the Board itself took just the opposite position in *Kinney* when it concluded in its decision that the list of

[10] Moreover, administrative agencies' actions can only be upheld on the basis articulated by the agency itself. *See NLRB v. Columbia University*, 541 F.2d 922, 930-31 (2d Cir. 1976). The ALJ never relied upon this ground when excluding the evidence (A-1309–1314), nor did the Board's decision.

qualified voters was "unimportant" in determining whether employees were temporary. *Id.*, 1433.

Further, the Board fails to adequately explain why its own precedent is inapplicable. *See, e.g., The Oakland Press Co.*, 266 NLRB 107, 108 (1983) ("a preelection agreement wherein, as here, an employer stipulates that certain individuals are not supervisors . . . does not estop the employer from subsequently contesting their status because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act."); Pet.-Br. 58-59. The Board argues *Oakland Press* is distinguishable because there the Regional Director did not accept the stipulation, and the Union withdrew its election petition before the supervisory issue was litigated. Regardless of whether the stipulation was accepted or the petition was withdrawn, the principle remains the same- because the supervisory status had not been litigated, the employer was not estopped by the pre-election stipulation from contesting supervisory status.

Likewise, the Board's reliance on *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 (1997) is misplaced. *I.O.O.F.* involved supervisory challenges within the *representation context,* not the ULP context. Further, the employer had an opportunity to litigate the supervisory issue in a prior proceeding but chose not to. *Id.* The Board has made no such argument here, nor could it, because Novelis had no reason to know who solicited cards until the hearing was underway. Accordingly, the pre-election agreement cannot preclude Novelis from contesting

card validity based on supervisory status. At most, the stipulations should have been considered as evidence in determining supervisory status. *Kinney,* 1434.

E. Admission Of Supervisory Evidence Would Not Have Unfairly Prejudiced The GC

The Board's arguments that denying Novelis' motion to amend its answer was proper due to alleged "undue delay" and "unfair prejudice" are equally unpersuasive. Bd.-Br. 70. The GC could not have been prejudiced when it opened the door to Abare's supervisory status on the first day of witness testimony. A-93–96[Tr.-246-56]. Even if the GC was unaware that Novelis was pursuing this issue, the GC (and Union) easily could have introduced rebuttal evidence, including from Abare, his co-workers (many of whom testified), and Novelis management. Indeed, the GC announced that intention during trial. A-451[Tr.-2825]. The fact that it ultimately chose not to call Abare or any other employee cannot support undue delay or prejudice claim.

IV. THE BOARD'S ARGUMENTS REGARDING UNLAWFUL CONFERRAL OF BENEFITS ARE UNAVAILING

Although the Board continues to assert that Novelis had knowledge of organizing activity prior to its January 9 announcement regarding Sunday premium and overtime pay, the Board's arguments are simply indefensible in light of the evidence and legal precedent.

A. The Board Has Failed To Prove That Novelis Had Knowledge Of Union Activity Prior To Its January 9, 2014 Announcement

For a grant of benefits to be unlawful, the employer must have "knowledge that the Union had begun organizing efforts among subject employees when the

benefits were promised." *Hampton Inn Ny—JFK Airport*, 348 NLRB 16 (2006). Although the Board rejected two of the ALJ's reasons for finding employer knowledge, the remaining scant evidence cannot sustain its finding that Novelis conferred benefits to stop union activity. The Board's "findings" require leaps in logic, reliance on speculation, and abandonment of evidence to make any connection to employer knowledge of organizing activity.

1. Employee's Statement To Sheftic

The Board argues that during a December 16 meeting "an employee told HR manager Sheftic that workers might seek union representation," to which Sheftic responded, "we certain[ly] hope that we don't have to have a union here at this point, that we will—we're better off doing our own negotiating." Bd.-Br. 30. The Board, however, offers no supporting citation for its allegation that at the meeting, "[o]ne employee suggested that workers might seek union representation." Bd.-Br. 6.[11] It is improper to base a finding on evidence not in the record.

Further, it is irrational to impute knowledge of organizing to Novelis when the *actual* record evidence shows organizing had not yet begun when the excluded December 16 hearsay statement purportedly was uttered. A-1709.

[11] The Board argues that "Novelis [incorrectly] contends . . . that the [ALJ] ruled this statement by Sheftic to be inadmissible." Bd.-Br. 30 n.4. Not so. Novelis' brief states that the ALJ "excluded as inadmissible hearsay the testimony that *an employee* mentioned the possibility of reaching out to a union during the meeting," not Sheftic's alleged response. Pet.-Br. 21 (emphasis added).

2. Parker's Statement To Gigon Sometime In December 2013

The Board also argues that "Novelis managers received a specific warning about union organization when employee Parker informed a supervisor that 'there was talk of a union' because employees were concerned about changes to their wages and benefits." Bd.-Br. 30. First, the Board mischaracterizes the evidence by asserting that Novelis *managers* received a warning, when no evidence exists that Gigon, the low-level supervisor to whom Parker allegedly made the statement, shared the statement with any Novelis management member. Such a statement to one low-level supervisor cannot impute knowledge on Novelis. *See, e.g., Gestamp S.C., L.L.C. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014). Pet.-Br. 22.

Additionally, Parker testified that Gigon did not respond to his alleged statement regarding "talk of a union." A-177[Tr.-771]. Given the apparent lack of response from Gigon, no evidence indicates whether he even heard or understood the statement, let alone shared the alleged comment with management. To fill this evidentiary void, the GC could have called Gigon as a witness, but it chose not to.

Moreover, Parker's testimony that the exchange occurred sometime in "December of 2013" does not establish when the statement was made in relation to the actual onset of union activity. Indeed, Parker's statement to Gigon that employees "might reach out to a union" is always a possibility in any workforce and cannot show knowledge of organizing that has "sufficiently crystallized so that some specific orientation exists." *Hampton Inn*, 18.

3. Anti-Union Employee Attendance At Union Meetings And Existence Of Card-Signing Drive

Lastly, the Board asserts that the *mere presence* of anti-union employees at union meetings and the *general existence* of an employee card-signing drive automatically imputes knowledge to Novelis. But no evidence establishes that Novelis managers knew about any union meetings. *See* Pet.-Br. 19. Rather, the ALJ found (and the Board left undisturbed), that "[c]ard solicitation by union supporters took place outside the presence of company managers and supervisors." A-1710. This explains why none of the 39 GC employee witnesses testified that management was present for or otherwise knew about card solicitations. The mere existence of an employee card-signing effort does not demonstrate management knowledge. Instead, the only evidence here tends to show the absence of employer knowledge.[12] The Board's speculation and illogical inferences are no substitute for evidence.

It is the GC's burden to prove Novelis' knowledge, not Novelis' burden to disprove it or prove a negative. The GC's failure of proof cannot be held against Novelis.

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[12] The Board's finding that Novelis' January 9 announcement "clearly had an impact on employees, with some requesting that their Union authorization cards be returned to them," (A-1717) was based on merely one employee, Weiss (Wise), as to whom the GC did not establish his reason for requesting his card back. *Id*., n.83; A-183[Tr.-809]. Moreover, the GC presented evidence that the Union collected at least 20 union authorization cards on and after January 9, which strongly suggests, consistent with the actual evidence in the case, that the announcement had no negative impact on the Union's campaign. A-658, A-746, A-823-824, A-828, A-834, A-837, A-845, A-857, A-863, A-866-868, A-871, A-913, A-915-918.

B. The Board Failed To Counter The Evidence Supporting Novelis' Legitimate Business Reasons For Its January 9, 2014 Announcement

The Board erroneously asserts that Novelis had no legitimate business reason for its January 9 announcement. The Board's timeline communicates a false narrative and is inconsistent with the record, which shows: (1) Novelis announced the same potential policy changes in May 2013 and, when employees objected, Novelis maintained the *status quo*; (2) when Novelis announced the same potential policy changes again in December 2013 (this time with enhanced pay to offset employee objections), employees again objected and Novelis again maintained the *status quo*; and (3) Novelis announced the decision at approximately 7:30 AM on the morning of January 9, 2014, *before* its receipt of the Union's demand for recognition later that afternoon. Pet.-Br. 3-4.

This undisputed timeline demonstrates Novelis' legitimate business reasons. Smith's January 9 letter to employees (the *only* evidence regarding Novelis' motives) (A-659) shows that Novelis had engaged in dialogue with its employees concerning the benefits at issue since May 2013, had shared information, answered questions, and listened to employee concerns. At the December 16 meeting, Novelis committed that it would consider and respond to employee concerns by mid-January. It was in response to employee concerns expressed in the December 16 meeting that Novelis decided to maintain the *status quo*. The GC failed to contradict Novelis' legitimate motives for its January 9 announcement, compounding its failure to establish management's knowledge of organizing.

V. CONCLUSION

"Again we must fault the board for failing to undertake the proper analysis and instead indulging in its well-established preference for issuing a bargaining order." *J. Coty*, 100. The Board admittedly ignored this Court's precedent, and based the most drastic remedy available under labor law on inferences unsupported by the record and which fly in the face of contrary facts (in the process, denying Novelis due process). The Board's obstinacy is an "instrument of oppression, allowing the government to tell its citizens: 'We don't care what the law says, if you want to beat us, you will have to fight us.'" *Heartland*, 18.

Novelis does not dispute a bargaining order may be appropriate under certain "rare" circumstances, but those circumstances are not present here. Not a single employee was discharged, there were no threats of plant closing, and Novelis conducted a lawful and extensive communication campaign emphasizing employee rights and free choice. Pet.-Br. 4-6, 51-52. But even if Novelis is found to have committed all of the alleged ULPs, the Board cannot issue a bargaining order imposing a union on hundreds of employees without acknowledging and applying the evidentiary and analytical requirements imposed by the Courts of Appeal. Here, the Board openly ignored the evidence and Second Circuit precedent. Its bargaining order must be rejected.

Respectfully submitted, this 18th day of May, 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) and because this brief contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2010 in proportionally spaced, 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Second Circuit Court of Appeals NextGen CM/ECF filing system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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